

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLIGER MERKO,

Defendant-Appellant.

UNPUBLISHED

March 20, 2008

No. 271800

Oakland Circuit Court

LC No. 2005-201508-FC

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of conspiracy to commit first-degree murder, MCL 750.316(1)(a), 750.157a, second-degree murder, MCL 750.317, one count of assault with intent to murder, MCL 750.83, and three counts of assault with intent to do great bodily harm less than murder, MCL 750.84. We affirm.

The incident giving rise to defendant's convictions is apparently the culmination of a rivalry between two groups of Albanian men that resulted in codefendant Ketjol Manoku opening fire at a minivan holding five members of the rival group after the minivan drove into a parking lot in the late night hours of July 17, 2004, where defendant and his codefendants were standing. Four of the minivan passengers were stuck by bullets, one fatally, as the minivan was attempting to leave the parking lot. Over the preceding couple of days, defendant, his codefendants, and others had met together on several occasions to watch and follow members of this same group of men, as well as to discuss and plan violent action against them.

On appeal, defendant first argues that evidence of other bad acts was improperly admitted as MRE 404(b) evidence because the evidence only tended to show defendant's propensity to engage in criminal activity. We disagree. We review the trial court's decision for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The evidence defendant claims was inadmissible was testimony related to purported actions before the shooting against Kutjim Karapici, a man who was friends with members of the rival group. In the first incident, which occurred in June of 2004, defendant's codefendants, Manoku and Edmond Zoica, confronted Karapici after a fist fight between Karapici and defendant's friend Drini Brahimilari. Manoku was alleged to have called a meeting with

Karapici at which meeting Zoica pulled a knife and pointed it at Karapici. Manoku pulled a gun, pointed it at Karapici, and fired, but Karapici was not struck by a bullet. In early July of 2004, Manoku again called a meeting with Karapici, at which meeting Manoku and defendant led him past a table full of knives into a plastic-covered room and told him to kneel. Defendant placed a pillow and gun to Karapici's head and threatened to kill him because of the disrespect he showed their friend Brahimilari. Karapici pleaded for his life and agreed to pay a sum of money in exchange for his release. Defendant later told his coconspirator, Florjon Carcani, that the only reason he did not kill Karapici is because Karapici had begged for his life. The other evidence that defendant claims was inadmissible bad acts evidence were two guns and two boxes of ammunition that defendant's friend, Arjan Malushi, turned over to police the day of the shooting. Malushi testified that defendant contacted him about a week after the shooting and wanted those guns back along with \$2,000. When Malushi said he did not have the guns, defendant assaulted him.

MRE 404(b) is inclusionary rather than exclusionary. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id.* at 65. Therefore, to be admissible under MRE 404(b), generally bad acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *VanderVliet*, *supra* at 74-75.

Defendant's argument on appeal is that the evidence had nothing to do with the shooting therefore it was not offered for a proper purpose. But, the prosecution sought admission of the disputed evidence for the purpose of proving defendant's intent, preparation, knowledge, opportunity, or absence of mistake. MRE 404(b). Specifically, the prosecution argued that the evidence showed knowledge of defendants working together to commit violent acts with handguns against other Albanians during the same time period as the shooting and knowledge of prior conspiracies. On appeal, the prosecution also argues that the disputed testimony was admissible to establish motive. See *People v Sabin (After Remand)*, 463 Mich 43, 59 n 6; 614 NW2d 888 (2000) ("The prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence.") Nevertheless, defendant's argument on appeal fails because clearly the evidence was *offered* for a proper purpose. See *Knox*, *supra*.

Next, defendant argues that "the 'chance' encounter between the two groups negates any nexus between prior alleged assaults, so-called conspiracies or wrongdoing and therefore has no relevance to the instant crimes." Evidence is considered "relevant" if it makes the existence of any fact at issue more or less probable. *VanderVliet*, *supra* at 60, quoting MRE 401. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *VanderVliet*, *supra* at 75.

The charges against defendant included first-degree premeditated murder, which required the prosecution to establish that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Defendant was charged with second-degree murder which required the prosecution to prove a death, caused by an act of the defendant, with malice, and

without justification or excuse. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice is the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Defendant was also charged with conspiracy to commit first-degree premeditated murder, thus the prosecution had to establish that defendant intended to combine with two or more persons to accomplish first-degree murder. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). “For intent to exist, the defendant must know of the conspiracy, must know of the objective of the conspiracy, and must intend to participate cooperatively to further that objective.” *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993). Defendant was also charged with assault with intent to kill, requiring the prosecution to prove an assault with an actual intent to kill that, if successful, would have made the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). And, defendant was charged with assault with intent to do great bodily harm less than murder—another specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Specific intent may be inferred from all of the facts and circumstances surrounding the crime. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). Defendant asserted a claim of self-defense.

The prosecution argued that the other acts evidence was relevant under its theories because the evidence demonstrated that this defendant and his codefendants (1) had recently engaged in prior conspiracies to commit crimes together against members or friends of the rival group and thus tended to establish that defendant had knowledge of the final conspiracy and intended to participate in it, (2) had actually accomplished the criminal objectives of these prior conspiracies which tended to establish defendant’s intent to commit the charged crimes, (3) had used handguns to accomplish their criminal purposes which tended to establish defendant’s intent to commit the charged crimes, as well as the manner in which the charged crimes were committed, (4) had attacked or threatened to kill previous victims which tended to establish defendant’s intent to kill, (5) had targeted other Albanian males who were friends with or members of the rival group which tended to establish a motive for defendant’s actions and defendant’s intent to commit the charged crimes, and (6) had been the aggressors in those confrontations which tended to negate defendant’s self-defense theory.

Considering the disputed evidence and its relationship to the elements of the charges, theories of admissibility, and defense asserted, we agree with the trial court and conclude that the evidence was relevant—it tended to make the existence of facts at issue more or less probable. Briefly, the Karapici incidents recently preceded the shooting and (1) he was a member or friend of the rival group who were in the minivan during the shooting, (2) were instigated by defendant and his codefendants, (3) involved defendant and his codefendant pulling a handgun and aiming it at the victim, (4) included threats of death, and (5) arose out of purported disrespect shown for defendant or his friend. The incident involving Malushi, where defendant demanded his guns and ammunition, occurred after the shooting and during the time in which he was overhead trying to secure guns so that he could kill the witnesses.

Thus, the evidence revealed the animosity between the rival groups and the escalation of that rivalry, creating a context for the shooting and providing a motive for the shooting. See *People v Hoffman*, 225 Mich App 103, 106-110; 570 NW2d 146 (1997). The evidence was also relevant to establish defendant’s intent to kill, which was the culmination of threats to kill

members or friends of the rival group using a handgun—acts of the same general category. See *VanderVliet*, *supra* at 80. Further, the evidence was relevant to the issue of defendant's knowledge of the conspiracy—which arose from this escalating rivalry that involved prior agreements to act in a violent manner—including the objective to kill members or friends of the rival group and his intent to participate cooperatively to further that objective. The evidence of defendant's attempt to secure guns after the shooting so that he could kill the witnesses was relevant to show his consciousness of guilt. And, the evidence was relevant to defendant's claim of self-defense, demonstrating that defendant and his coconspirators were the aggressors in prior confrontations with members or friends of the rival group.

Defendant next claims that, even if the evidence was offered for a proper purpose and was relevant, it should have been excluded because its probative value was substantially outweighed by its potential for unfair prejudice. For the reasons discussed above, we disagree. Although the challenged evidence was damaging to defendant's case, the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice. See *VanderVliet*, *supra* at 75. And, we reject defendant's claim that the trial court's limiting instruction was insufficient. In summary, the trial court did not abuse its discretion in admitting the evidence, and defendant was not denied a fair trial because the evidence was admitted.

Next, defendant argues that he was denied his right to present a defense to a properly instructed jury because the trial court denied his request for a self-defense instruction. We disagree. We review issues of law concerning jury instructions *de novo* and the trial court's determination whether a particular instruction is applicable to the facts for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A defendant has a right to a properly instructed jury thus a requested instruction must be given if the evidence supports it. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). But, an instruction not supported by the evidence should not be given. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). To prove self-defense in support of a claim of justifiable homicide, the evidence must establish that (1) the defendant honestly and reasonably believed he was in danger, (2) the danger feared was death or serious bodily harm, (3) the action taken appeared at the time to be immediately necessary, and (4) the defendant was not the initial aggressor. *People v Riddle*, 467 Mich 116, 119, 120 n 8; 649 NW2d 30 (2002).

Here, the trial court refused to give a self-defense instruction on the grounds that defendant and Manoku, approached the minivan, they were the initial aggressors, and the minivan was pulling away, out of the parking lot, before the shots were fired. That decision did not constitute an abuse of discretion. The evidence included that the minivan drove slowly into the parking lot with its headlights on, defendant and Manoku approached the minivan, Manoku pulled a handgun out, racked it, and began shooting at close range. The medical examiner testified that Markiol Jaku, who was killed in the shooting, had stippling injuries to the left side of his face which was consistent with a shot being fired at close range while Jaku was seated in the driver's seat with his arms extended forward toward the steering wheel. There was no evidence that the people in the minivan pointed or fired a gun at anyone and, in fact, they did not even return fire in response to the shooting. There was no evidence of any threatening behavior by the men in the minivan before the shooting began. And, even as the minivan was accelerating out of the parking lot, Manuko continued shooting directly at the minivan, striking the victims.

The elements of self-defense are wholly lacking; thus, the trial court's denial of defendant's request for a self-defense instruction was proper.

Next, defendant argues that the evidence was insufficient to support a conviction of conspiracy to commit first-degree murder. After considering the evidence in a light most favorable to the prosecutor, we disagree and conclude that a rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt. See *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

A conspiracy is a voluntary mutual agreement, express or implied, between two or more persons to commit a criminal act. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The conspiracy statute provides punishment for the actual advance planning and agreement to perform the substantive criminal act. *People v Hammond*, 187 Mich App 105, 107-108; 466 NW2d 335 (1991), quoting *People v Gilbert*, 183 Mich App 741, 749-750; 455 NW2d 731 (1990). There must be the intent to combine with others for an unlawful purpose. *Blume, supra*. For that intent to exist, the defendant must know of the conspiracy, must know of its objective, and must intend to participate cooperatively to further that objective. *Id.* at 485. A conspiracy is complete upon formation of the agreement; no overt act in furtherance of the conspiracy must be shown to support a conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). Proof of conspiracy may be derived from the circumstances, acts, and conduct of the parties during the crime, and inferences are permissible. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Minimal circumstantial evidence is sufficient to prove intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

The substantive criminal act in this case is first-degree premeditated murder, which is the intentional killing of a victim where the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Thus, to sustain a conviction for conspiracy to commit first-degree murder, the prosecution must prove that (1) the defendant possessed the specific intent to murder, (2) his coconspirators possessed the specific intent to murder, (3) defendant and his coconspirators possessed the specific intent to combine for the purpose of deliberating and planning the crime with the intent to kill. See *Blume, supra*; *Anderson, supra*; *People v Hamp*, 110 Mich App 92, 103; 312 NW2d 175 (1981). Defendant's specific intent may be inferred from all of the facts and circumstances surrounding the crime. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995).

Here, defendant "denies that he had any premeditated and deliberated intent to kill sufficient to support the crime of conspiracy to commit first degree murder." We disagree. In brief, considered in a light most favorable to the prosecution, the evidence revealed that defendant and his coconspirators met together on July 15, 2004, near a coffee shop in Royal Oak where members of the rival group were patronizing, for the purpose of shooting Markiol Jaku and Martin Vucaj, members of that rival group. Because the shop was very crowded with people, the shooting did not occur. Instead, later that night or the next evening, defendant and his coconspirators proceeded to watch the coffee shop the rival group members were fixing up to open which was called Goodfellows. Defendant and his coconspirators were dressed in dark clothing and were in vehicles with tinted windows. When one of the members of the rival group left the shop, coconspirator Zoica and some of his friends followed. Zoica rolled his window down and had a handgun but did not shoot at the rival group member possibly because of heavy traffic or because they could not tail him close enough to get off a shot.

The day before the shooting, July 16, 2004, defendant and his coconspirators met at a coney island to discuss shooting members of the rival group at Goodfellows. Later that day, they also met at Manoku's apartment to discuss the shooting. They developed a plan to return to Goodfellows and "shoot up the people," meaning shoot members of the rival group. Manoku would ride on the back of a motorcycle and do the shooting. The shooting would occur the next night, July 17, 2004, the night before defendant's wedding.

The next day—the day of the planned shooting—they prepared for the shooting by retrieving weapons, including an AK-47 assault rifle. The assault rifle was placed in defendant's vehicle. After the motorcycle was in position for the shooting, the plan was changed and defendant and his coconspirators went to an apartment complex. While in the parking lot, where defendant and his coconspirators were standing by their vehicle that held the AK-47, a minivan carrying rival group members pulled into the parking lot. Defendant quickly approached the minivan with Manoku right behind. Shortly thereafter Manoku pulled his nine millimeter handgun and opened fire, shooting four of the five people in the minivan as it was attempting to leave. After disposing of evidence and agreeing to an alibi, defendant and his coconspirators went to Zoica's apartment and pretended to be having a party. When the police arrived, defendant left the scene and stayed in the basement of his wife's family's house for days. Defendant was overheard saying "that mother fucker deserved to die." He was also heard trying to secure three to four guns that he would use to kill the witnesses. Defendant threatened his wife's family saying "You guys do anything, you go to police or you guys talk, anything, we're going to blow your house." The family sold their home and business and fled the state.

Considering all of the facts and circumstances surrounding the crime, we conclude that the evidence at trial enabled the jury to find beyond a reasonable doubt that defendant and his coconspirators possessed the specific intent to murder and defendant and his coconspirators possessed the specific intent to combine for the purpose of deliberating and planning the murder with the intent to kill. Thus, the evidence was sufficient to support defendant's conviction.

Next, defendant argues that he was improperly sentenced to life without parole for the conspiracy to commit first-degree murder conviction because it is a parolable offense. Pursuant to MCL 791.234(6) and *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989), defendant is correct that it is a parolable offense. And defendant's judgment of sentence correctly indicates that he was sentenced to life for this conviction.

In his Standard 4 brief on appeal, defendant first claims, without citation to the record or any supporting arguments, that all of his convictions were against the great weight of the evidence. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Accordingly, we decline to further consider this issue.

Defendant also argues that the trial court violated its duty to ensure that he had a fair trial because (1) it improperly allowed morgue photos into evidence, (2) it took no action in response to alleged prosecutorial misconduct, (3) it "did not instruct the jury between Michigan and Federal statutes," (4) it did not grant defendant's motion for a mistrial, and (5) it denied defendant his right to confront a witness against him because "a witness testified as to Arjan Malushi's admission about their involvement in the crime, with varying degree [sic] of specificity." To the extent that we understand these issues, we conclude that they have no merit.

A small number of morgue photos were admitted to show the injuries to the victim, including that they were inflicted at close range. We discern no prosecutorial misconduct. The jury instructions were proper. Defendant was not entitled to a mistrial. And, defendant's right to confront the witnesses against him was not violated.

Finally, defendant argues that he was denied a fair trial due to prosecutorial misconduct. Because defendant did not object below, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant claims that the prosecutor argued a fact not in evidence. According to defendant, "The 'fact argued' was: 'The plan is, and Oliver Merko was an active verbal participant in this plan, he was a big part of the whole thing, [he was the leader you could say].'" Defendant takes issue with the claim that he was the leader. A prosecutor may not argue facts outside of the evidence but may argue the evidence and all reasonable inferences. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In light of the evidence presented, that defendant was a leader in their group was a reasonable inference. Plain error warranting relief was not established.

Affirmed.

/s/ Michael J. Talbot

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra